No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1998

STATE UNIVERSITY OF NEW YORK
COLLEGE AT NEW PALTZ, *et al.*

Petitioners,

v.

DR. JANICE W. ANDERSON, PH.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Equal Pay Act validly abrogates the States' Eleventh Amendment immunity from suit in federal court.

PARTIES TO THE PROCEEDING

The petitioners in this case are the State University of New York, College at New Paltz; the Board of Trustees of the State University of New York; Dr. Roger W. Bowen, who was automatically substituted as a party for his predecessor, Dr. Alice Chandler, in his official capacity as President and Chief Administrator of the State University of New York, College of New Paltz; and Dr. John W. Ryan, who was automatically substituted as a party for his predecessor, Dr. Thomas A. Bartlett, in his official capacity as Chancellor of the State University of New York. While the Board of Regents of the University of the State of New York and Dr. Carl T. Hayden, in his official capacity as Chancellor of the Board of Regents of the University of the State of New York were named in the original complaint, they were omitted from the amended complaint and did not thereafter participate in the proceeding.

The respondent in this case is Dr. Janice W. Anderson. Although the United States moved before the Second Circuit to intervene pursuant to 28 U.S.C. § 2403(a), the motion was never decided and, instead, the United States appeared as an amicus curiae. (The identification of the United States as "Intervenor" among the listing of counsel in the Second Circuit's decision appears, therefore, to be a clerical error.)

RULE 29.1 STATEMENT

Petitioner State University of New York, College at New Paltz, is governed by petitioner Board of Trustees of the State University of New York, which is a creation of statute and an arm of the State of New York. The remaining petitioners are individuals.

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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

STATE UNIVERSITY OF NEW YORK,
COLLEGE AT NEW PALTZ, et al.

Petitioners,

v.

DR. JANICE W. ANDERSON, PH.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI

Petitioners State University of New York, College at New Paltz ("SUNY-New Paltz"), *et al.* hereby petition this Court to issue a writ of certiorari to review a ruling of the United States Court of Appeals for the Second Circuit. 28 U.S.C. § 2403(a) may apply.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 169 F.3d 117 (2d Cir. 1998). *See Appendix* ("*App.*") at 1a-10a. The opinion of the district court is not reported. *See id.* at 11a-27a.

BASIS OF JURISDICTION

The decision of the Court of Appeals sought to be reviewed was issued and entered on February 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> SECTION 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. Amend. XIV §§ 1, 5.

The Equal Pay Act (the "EPA") was enacted in 1963 as an amendment to the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 201 through 219. Pub. L. No. 88-38, 77 Stat. 56. The EPA provides, in relevant part:

> Prohibition of sex discrimination. (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d).

Because the EPA was enacted as an amendment to the FLSA, it is governed by the FLSA's definitional and enforcement provisions. Those provisions are reproduced in full in the Appendix. *See App.* at 38a - 42a.

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE DISTRICT COURT

Respondent Dr. Janice W. Anderson is a tenured Associate Professor in the Communication and Media Department of SUNY-New Paltz's College of Liberal Arts and Sciences. She commenced this federal lawsuit in May of 1995 against SUNY-New Paltz, SUNY's Board of Trustees and the chief executive officials of the College and the University, respectively, whom she sued only in their official capacities (collectively, "petitioners"), alleging that she receives less pay than her male counterparts.

More particularly, her amended complaint alleges salary discrimination in violation of (i) the EPA, (ii) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, *et seq.* ("Title VII") and (iii) the New York Human Rights Law, N.Y. Exec. Law § 296 (the "HRL"). It also alleges that petitioners retaliated against her after she complained about their discriminatory practices. The jurisdiction of the federal district court was invoked pursuant to 28 U.S.C. § 1331.

When discovery was nearly completed, petitioners moved to dismiss respondent's wage discrimination claims under both the EPA and the HRL on the ground that the Eleventh Amendment barred the district court from considering them. With respect to the EPA, petitioners argued that because Congress expanded the coverage of the EPA pursuant to its authority under the Commerce Clause of Article I of the United States Constitution, and not the Fourteenth Amendment, Congress lacked the power to abrogate the States' Eleventh Amendment sovereign immunity. Thus, petitioners argued, Eleventh Amendment immunity bars individuals from enforcing the EPA against the State and its agencies in federal court. (Petitioners did not and have not argued, on the other hand, that the State is not subject to the

provisions of the EPA; they have argued only that the Eleventh Amendment requires private actions to enforce those provisions against the State to be brought in state court. Additionally, the EEOC may, of course, enforce the EPA against the States in federal court, as the Eleventh Amendment would not bar such enforcement actions.) Petitioners also moved for summary judgment with respect to respondent's remaining claims.

Respondent opposed petitioners' motions and cross-moved for partial summary judgment, arguing that she had established petitioners' liability under the EPA as a matter of law.

In an unreported decision issued from the bench on December 9, 1997, the district court dismissed respondents' HRL claim, but refused to dismiss the EPA claim (*App.* at 14a - 17a). The court concluded that when Congress expanded the coverage of the EPA to include the States, it effectively abrogated the States' Eleventh Amendment immunity from suits in federal court, because it made its intent to abrogate clear[1] and it acted pursuant to its power to enforce the Fourteenth Amendment. At the same time, however, the court expressed its doubts about whether the statute represented a valid exercise of Congress's power to enforce the Fourteenth Amendment by recognizing that the issue presented "exceptionally complex questions," and it certified the question for immediate appeal (*App.* at 17a).

Turning to the summary judgment motions, the district court denied both parties' motions for summary judgment with respect to the EPA claim, but granted summary judgment to petitioners on respondent's Title VII claim (*App.* at 17a - 23a). It also dismissed

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[1] The State has not challenged the district court's finding that Congress sufficiently expressed its intent to abrogate the States' Eleventh Amendment immunity in enforcement actions under the EPA. That intent appears clear from the definitional and enforcement provisions of the FLSA which govern the EPA (*see App* at 6a).

respondent's claim of retaliation, and it limited any back-pay award under the EPA to the applicable limitations period (*App.* at 23a - 25a). Thus the only remaining claim in this federal case is respondent's claim under the EPA.

These rulings were incorporated into an order entered on December 15, 1997 (*App.* at 11a - 13a). Although recognizing that the district court's order with respect to petitioners' sovereign immunity under the EPA was an immediately appealable order in any event, *see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), petitioners timely moved for permission to appeal that portion of the order in accordance with 28 U.S.C. § 1292(b). Petitioners also filed a timely notice of appeal. Respondent subsequently filed a notice of cross-appeal, dated December 29, 1997, purporting to appeal that portion of the district court's order which granted summary judgment in favor of petitioners with respect to respondent's Title VII claim.

B. PROCEEDINGS IN THE COURT OF APPEALS

Recognizing that the district court's decision on the issue of the States' immunity from suit constituted an immediately appealable order, the Second Circuit denied petitioners' motion for permission to appeal as unnecessary (*App.* at 5a n.2). Additionally, by order dated February 10, 1998, the Second Circuit dismissed respondent's interlocutory cross-appeal on the ground that it lacked appellate jurisdiction to hear it (*App.* at 52a n.1).

By decision dated February 24, 1999, the Second Circuit affirmed the order of the district court denying petitioners' motion to dismiss respondent's claim under the EPA. In a *per curiam* decision, the Court held that when Congress effectively amended the EPA by amending the FLSA in 1974, it did so pursuant to a valid exercise of its power to enforce the Fourteenth Amendment and, thus, it effectively abrogated the States'

Eleventh Amendment immunity from suit in federal court (*App.* at 5a - 10a). Notably, the Second Circuit recognized that the EPA expanded the rights conferred by the Fourteenth Amendment in that the statute does not require an employee to show purposeful discrimination on the part of an employer to recover (*App.* at 8a). Despite this statutory expansion of rights, however, the court viewed the EPA as legislation "reasonably tailored to remedy intentional gender-based wage discrimination" and, therefore, proper enforcement legislation under the Fourteenth Amendment (*App.* at 9a).

REASONS FOR GRANTING THE WRIT

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), this Court held that Congress lacks the power under the Commerce Clause to abrogate the States' Eleventh Amendment immunity from suit in federal court. The enforcement clause of the Fourteenth Amendment now remains the only recognized source of authority for legislation in which Congress may validly abrogate the States' Eleventh Amendment immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Congress's power to enact legislation under the Fourteenth Amendment is not unlimited, however. In *City of Boerne v. Florida*, 521 U.S. 507 (1997), the Court made clear that Congress's power to enact legislation under that Amendment extends only to *enforcing* the constitutional requirements of the Amendment. 521 U.S. at 519. Thus, Congress does not have the power by legislation "to decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.*

The Second Circuit's decision in this case is in tension with the teachings of this Court in *City of Boerne* that Congress's power to enact legislation under the Fourteenth Amendment extends only to enforcing the provisions of that Amendment, and that legislation can be viewed as proper enforcement legislation only

if it represents a proportional response to some constitutional violation that Congress seeks to remedy or prevent. The State has argued that the EPA cannot be viewed as representing such a proportional response, because it confers substantive rights more extensive than those conferred under the Amendment itself and there is no evidence that the EPA was enacted to curb unconstitutional acts under the Amendment.

While there currently exists no conflict on the issue of Congressional abrogation of the States' Eleventh Amendment immunity specifically under the EPA, the federal courts have divided over this issue under a variety of comparable statutes and, indeed, this Court has now granted certiorari to resolve the issue under three such statutes. Petitioners urge this Court to grant or hold this writ of certiorari in order to assure that a consistent analysis is applied with respect to the EPA.

I. THIS PETITION SHOULD BE GRANTED OR HELD PENDING THIS COURT'S DECISIONS IN RELATED MATTERS.

In the wake of this Court's decisions in *Seminole* and *City of Boerne*, the jurisdiction of the federal courts to hear a wide array of claims against the States under statutes enacted pursuant to Congress's Article I powers has been thrown into question. Courts must now decide whether these statutes also represent a valid exercise of Congress's power to enforce the Fourteenth Amendment, and the proper analysis for doing so remains largely unsettled. Indeed, when it stated that Congress's Section 5 powers are limited to enacting remedial, as opposed to substantive, legislation, this Court recognized at the same time that the line between remedial and substantive legislation can be difficult to discern. *City of Boerne*, 521 U.S. at 519. The result has been, in the words of one court, "disarray" among the federal courts. *Varner v. Illinois State Univ.*, 150 F.3d 706, 716 n.12

(7th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3469 (Jan. 11, 1999) (No. 98-1117).

This Court has already granted certiorari to review three decisions raising questions closely analogous to the abrogation question decided by the Second Circuit in this case. This Term, the Court heard arguments addressing whether the Lanham Act, 15 U.S.C. § 1051 *et seq.*, and the Patent Remedy Act, 35 U.S.C. §§ 271, 296, constitute legislation validly enacted pursuant to Section 5 of the Fourteenth Amendment. *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 131 F.3d 353 (3d Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999) (Lanham Act); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 148 F.3d 1343 (Fed. Cir. 1998), *cert. granted*, 119 S. Ct. 790 (1999) (Patent Remedy Act). Then, in *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 *and* 119 S. Ct. 902 (1999), the Court will consider whether the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. §§621 through 634, represents legislation validly enacted pursuant to Section 5, as well as whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity from suit in the text of that statute.

Kimel is particularly analogous. In *Kimel*, the Eleventh Circuit held that Congress did not abrogate the States' Eleventh Amendment immunity for suits under the ADEA. *Kimel*, 139 F.3d 1426. The majority reached its conclusion utilizing different rationales. Adopting the view of the only members of this Court to have ever addressed the question, *see EEOC v. Wyoming*, 460 U.S. 226, 251-65 (1983) (Burger, C.J., dissenting), Judge Cox of the Eleventh Circuit squarely found that the ADEA could not be adjudged as legislation validly enacted pursuant to Section 5 of the Fourteenth Amendment, because it confers rights more extensive than those conferred by the Fourteenth Amendment itself and there is no basis for finding

that Congress enacted the ADEA as a proportional response to any widespread violations of the elderly's constitutional rights. *Kimel*, 139 F.3d 1426, 1446-47 (11th Cir. 1998) (Cox, J., concurring in part, dissenting in part). Judge Edmondson agreed that good reason existed to doubt the ADEA was enacted pursuant to the Fourteenth Amendment, but ultimately did not reach the issue, concluding instead that the ADEA did not abrogate the States' Eleventh Amendment immunity from suit because Congress failed to express its intent to abrogate that immunity unequivocally in the ADEA itself. *Kimel*, 139 F.3d at 1430-33.

The Eighth Circuit also has held that the ADEA does not abrogate the States' Eleventh Amendment immunity from suit. *Humenansky v. Regents of the Univ. of Minnesota*, 152 F.3d 822 (8th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3504 (Feb. 1, 1999) (No. 98-1235). *But see Coger v. Board of Regents of State of Tennessee*, 154 F.3d 296 (6th Cir. 1998) (ADEA effectively abrogates States' Eleventh Amendment immunity from suit), *petition for cert. filed*, 67 U.S.L.W. 3364 (Nov. 16, 1998) (No. 98-821); *Keeton v. University of Nevada Sys.*, 150 F.3d 1055 (9th Cir. 1998) (same); *Scott v. University of Mississippi*, 148 F.3d 493, 498-503 (5th Cir. 1998) (same); *Goshtasby v. Board of Trustees of the Univ. of Illinois*, 141 F.3d 761 (7th Cir. 1998) (same); *Hurd v. Pittsburgh State Univ.*, 109 F.3d 1540, 1542-46 (10th Cir. 1997) (same); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694-95 (3d Cir. 1996) (same); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983) (same). Presumably, the Court granted certiorari in *Kimel* to resolve this conflict among the courts of appeals.

As in *Kimel*, the State has argued in this case that the relevant statute, in this case the EPA, was not enacted pursuant to Section 5 of the Fourteenth Amendment, but rather represents an exercise of Congress's powers under the Commerce Clause. This is so because while the EPA substantially expands the rights

conferred by the Fourteenth Amendment, there appears to be no sound basis -- either in the legislative record or elsewhere -- for finding that Congress viewed such an expansion as necessary to remedy or prevent unconstitutional discrimination by the States. Rather, as legislation aimed at conferring substantive rights rather than remedying unconstitutional acts, the EPA does not satisfy this Court's "congruence and proportionality" test, that legislation may be viewed as valid enforcement legislation only if it represents a proportional response to a constitutional violation that Congress seeks to remedy or prevent.

Petitioners recognize that there currently exists no conflict among the courts of appeals with respect to the issue of Congressional abrogation of the States' Eleventh Amendment immunity specifically under the EPA. In ruling as it did, the Second Circuit joined the three other circuits to have considered this issue since this Court's decision in *Seminole*. *See Varner*, 150 F.3d 706; *Ussery v. Louisiana*, 150 F.3d 431 (5th Cir. 1998), *cert. dismissed*, 119 S. Ct. 1161 (1999); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997) (2-to-1 decision). However, because the issue raised with respect to the EPA is closely analogous to the abrogation issues this Court will consider in *Kimel* and the *Florida Prepaid* cases, petitioners urge this Court to grant or hold this petition in order to assure a consistent approach among these statutes.[2]

---

[2] Petitioners also note that with respect to the other court of appeals' cases deciding the Eleventh Amendment issue under the EPA, a petition for certiorari is currently pending from the Seventh Circuit's decision in *Varner*; the petition for certiorari filed in *Ussery* was dismissed by this Court only following settlement of the case by the parties which, notably, occurred after this Court had requested a response to the petition; and the State ultimately prevailed on the merits in *Timmer* and, therefore, had no occasion to seek this Court's review.

II. THE DECISION BELOW IS IN TENSION WITH THIS COURT'S HOLDING IN *CITY OF BOERNE*

Because the EPA does not just remedy unconstitutional acts but, rather, confers substantive rights, it does not satisfy this Court's "congruence and proportionality" test, and the Second Circuit's decision holding otherwise runs counter to *City of Boerne*.

The parties here have not disputed that, in contrast to the Equal Protection Clause or even Title VII, a plaintiff need not demonstrate any discriminatory animus to establish a violation of the EPA. *Compare Washington v. Davis*, 426 U.S. 229 (1976) (Equal Protection Clause), *Personnel v. Administrator v. Feeney*, 442 U.S. 256, 273-74 (1979) (same), *and Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1980) (Title VII), *with Corning Glass Works v. Brennan*, 417 U.S. 188, 195-96 (1974) (EPA), *and Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310 (2d Cir. 1995) (same).

Indeed, the voluminous legislative history of the 1974 amendments to the FLSA -- the amendments which extended the coverage of the FLSA and, consequently, the EPA to the States -- contains no evidence that Congress determined that a less stringent standard for establishing liability was necessary to remedy or prevent unconstitutional discrimination by the States. Quite the contrary, that history amply demonstrates that in making the EPA applicable to the States, Congress was concerned with issues unrelated to the antidiscrimination aims of the Fourteenth Amendment, namely the need to increase the minimum wage and to extend the FLSA's wage and overtime protections to new classes of employees in an age of rampant inflation. *See, e.g.*, S. Rep. No. 93-690, 93d Cong., 2d Sess. 1-2 (1974) ("The purpose of this bill is to incorporate into the [FLSA] a breadth of coverage and a minimum wage level sufficient to bring the Act closer to meeting its basic, stated

objective -- the elimination of 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency and general well being of workers.'"); *id.* at 7-10 (explaining that amendments needed because minimum wage still fixed at 1966 levels despite inflation); H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. Code Cong. & Admin. News 2811, 2812 ("The bill seeks to implement the policy of the Act by (1) providing an increase in the minimum wage rate, and (2) extending the benefits and protection of the Act to workers engaged in commerce or in the production of goods for commerce, or employed in enterprises engaged in commerce or in the production of goods for commerce.").

Moreover, just two years earlier, when Congress apparently had been concerned with remedying perceived constitutional violations by the States, it acted by amending Title VII to extend its coverage to State and local employers, *see* Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, § 2 (*codified at* 42 U.S.C. § 2000e), at that time expressly relying on its Section 5 enforcement power. *See* H.R. Rep. No. 92-238, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2154 (observing that expansion of Title VII "firmly embodied in the principles of the Constitution [because] [t]he clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination"). There is little reason to believe that just two years later, Congress viewed Title VII as inadequate to remedy or prevent unconstitutional sex discrimination by the States.

Lacking such a basis, the decision of the Second Circuit threatens to turn the principle of deference to Congress on its head. Instead of deferring to Congress's judgment that Title VII would adequately serve to remedy or prevent any unconstitutional sex discrimination by the States, the Second Circuit has stepped in and substituted its own judgment that the enhancement of rights provided by the EPA is also needed to remedy or

prevent unconstitutional sex discrimination by the States specifically in the payment of wages, thereby effectively conducting its own "proportionality and congruence" analysis in a vacuum.

In fact, there is little basis for finding that those State employment practices prohibited by the EPA that are not already prohibited by the Equal Protection Clause itself or by Title VII are comprised mostly, or even significantly, of unconstitutional practices. Accordingly, the EPA need not be adjudged as proportional enforcement legislation. *See City of Boerne*, 521 U.S. at 532-35 (with no reason to believe statute would have invalidated mostly unconstitutional laws, statute could not be viewed as proportional enforcement legislation).

CONCLUSION

This Court should issue the writ or, at a minimum, hold the petition pending the outcome of the *Kimel* and *Florida Prepaid* appeals.

Dated: Albany, New York
May 14, 1999

Respectfully submitted,

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Opinion of the Court of Appeals, filed February 24, 1999

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: September 22, 1998 Decided: February 24, 1999)

Docket No. 98-7025(L)

DR. JANICE W. ANDERSON, PH.D.,

Plaintiff-Appellee,

—v.—

STATE UNIVERSITY OF NEW YORK, COLLEGE AT NEW PALTZ, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, THE BOARD OF REGENTS OF THE STATE UNIVERSITY OF NEW YORK, DR. CARL T. HAYDEN, PH.D., in his official capacity as Chancellor of the State University of New York, DR. ALICE CHANDLER, PH.D., in her official capacity as President and Chief Administrator of the State University of New York, College of New Paltz, and DR. THOMAS A. BARTLETT, PH.D., in his official capacity as Chancellor of the State University of New York,

Defendants-Appellants.

Before:

LEVAL and STRAUB, *Circuit Judges*,
and POLLACK, *District Judge*.*

Appeal from an order of the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Chief Judge*), denying the defendants' motion to dismiss the plaintiff's action under the Equal Pay Act for lack of subject matter jurisdiction due to the Eleventh Amendment. We hold that the Equal Pay Act abrogated the States' Eleventh Amendment immunity from suit in federal court pursuant to a valid exercise of Congress's enforcement power under § 5 of the Fourteenth Amendment.

Affirmed.

ANDREA OSER, Assistant Attorney General, Albany, NY (Dennis C. Vacco, Attorney General of the State of New York, Peter H. Schiff, Deputy Solicitor General, Nancy A. Spiegel, Assistant Attorney General, of counsel), *for Defendants-Appellants*.

RONALD G. DUNN, Gleason, Dunn, Walsh & O'Shea, Albany, NY, *for Plaintiff-Appellee*.

SETH M. GALANTER, Department of Justice, Washington, DC (Bill Lann Lee, Acting Assistant Attorney General, Jessica Dunsay

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* The Honorable Milton Pollack, of the United States District Court for the Southern District of New York, sitting by designation.

Silver, of counsel), *for United States as Intervenor.*

(Janice Goodman and Sean Farhang, Goodman & Zuchlewski LLP, New York, NY, submitted a brief for *amici curiae* National Employment Lawyers Association, National Women's Law Center, National Partnership for Women & Families, Equal Rights Advocates, and Employment Law Center).

PER CURIAM:

Defendants State University of New York, College at New Paltz, et al., appeal from a December 12, 1997, order of the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Chief Judge*), denying their motion to dismiss Plaintiff Dr. Janice W. Anderson's claim pursuant to the Equal Pay Act of 1963, 29 U.S.C. § 206(d) ("EPA"), for lack of subject matter jurisdiction under the Eleventh Amendment. For the reasons that follow, we hold that the District Court has jurisdiction over the plaintiff's EPA claim because Congress abrogated the States' sovereign immunity through a valid exercise of its powers under § 5 of the Fourteenth Amendment.

BACKGROUND

Dr. Anderson brought this suit against various state entities and officers, alleging violations of the EPA, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the New York Human Rights Law, N.Y. Exec. Law § 290 *et seq.* When she filed her complaint, Dr. Anderson was

employed as an Assistant Professor at the State University of New York, College at New Paltz ("SUNY New Paltz"). Dr. Anderson began teaching in the SUNY New Paltz Communications Department in 1984 and was granted a "continuing appointment" or tenure in 1991. She alleges that since 1984, she has been paid less than male faculty of similar rank at SUNY New Paltz despite her equivalent or superior qualifications, record, and workload. She began complaining to responsible officials at SUNY New Paltz in 1991, and she contends that she was denied a merit increase in salary in January 1993 as a result of such complaints. She filed her complaint in this case in the Northern District of New York on July 19, 1995.

On November 7, 1997, the defendants moved to dismiss the plaintiff's EPA and New York Human Rights Law claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and moved for summary judgment on the plaintiff's remaining claims. With respect to the EPA claim, the defendants argued that as entities or officers of the State of New York, they were entitled to Eleventh Amendment immunity on this claim and therefore could not be sued in federal court. By bench opinion of December 8, 1997, and by subsequent order filed December 15, 1997, the District Court granted the defendants' motion for summary judgment in part and denied it in part, and denied the plaintiff's cross-motion for partial summary judgment in its entirety.

In its bench opinion and subsequent order, the District Court also denied the defendants' motion to dismiss the EPA claim for lack of subject matter jurisdiction and held that, in extending the EPA to the States, Congress abrogated the States' Eleventh Amendment immunity through its remedial powers under § 5 of the Fourteenth Amendment. The defendants filed a timely notice of appeal of this aspect of the Dis-

trict Court's decision on December 18, 1997.[1] We have jurisdiction to review this order "because orders denying States' claims of Eleventh Amendment immunity fall under the collateral order doctrine, which allows immediate appellate review in certain circumstances of what would otherwise be non-final decisions." *Cooper v. New York State Office of Mental Health*, 162 F.3d 770, 772 (2d Cir. 1998); *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).[2]

DISCUSSION

We review *de novo* a district court's legal conclusion regarding its subject matter jurisdiction on a Rule 12(b)(1) motion. *See Cooper*, 162 F.3d at 773.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Supreme Court has interpreted the Eleventh Amendment to mean that states, as sovereigns, are immune from suit in federal court absent consent or abrogation of that immunity by Congress. *See Seminole Tribe v. Florida*, 517 U.S. 44, 54-55 (1996). In this case, New York has not con-

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[1] The plaintiff also appealed that portion of the District Court's order that granted summary judgment to the defendants on the plaintiff's Title VII wage discrimination claims. The defendants moved to dismiss that appeal for lack of appellate jurisdiction, and a panel of this Court granted that motion by order filed on February 10, 1998.

[2] The District Court also certified this issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). However, a panel of this Court denied the defendants' subsequent motion under § 1292(b) for leave to appeal as unnecessary since the order appealed from was immediately appealable under the collateral order doctrine.

sented to suit in federal court, so the defendants are subject to suit in federal court only if Congress, in enacting the EPA, effectively abrogated the States' sovereign immunity. "In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has unequivocally expresse[d] its intent to abrogate the immunity," *id.* at 55; and second, whether Congress has acted "pursuant to a constitutional provision granting Congress the power to abrogate," *id.* at 59. The Court has made clear that Congress may abrogate state immunity when it acts pursuant to its enforcement power under § 5 of the Fourteenth Amendment. *See id.* (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976)).

The EPA was passed in 1963 as an amendment to the Fair Labor Standards Act of 1938 ("FLSA"). *See* Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d)). As part of the FLSA, the EPA utilizes the FLSA's enforcement mechanisms and employs its definitional provisions. Thus, when the FLSA was amended in 1974 to allow for suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," the scope of the EPA was extended as well. *See* FLSA Amendments of 1974, Pub. L. No. 93-259, § 6(d)(1), 88 Stat. 55, 61 (amending 29 U.S.C. § 216(b)). In *Close v. New York*, 125 F.3d 31 (2d Cir. 1997), we found that § 216(b) of the FLSA as amended in 1974 "evinces a clear intent to abrogate the States' sovereign immunity by allowing suit in federal courts." *Id.* at 36. The defendants concede that the EPA, utilizing the enforcement mechanism of the FLSA, satisfies the first prong of the *Seminole Tribe* test. Therefore, we turn to the sole question raised by this appeal—whether Congress enacted the EPA pursuant to a valid exercise of its § 5 remedial power under the Fourteenth Amendment.

The defendants first contend that because Congress enacted the EPA pursuant to its authority under the Commerce Clause and not pursuant to its § 5 power, it did not have the power to abrogate the States' sovereign immunity. They maintain that neither the EPA nor the 1974 FLSA amendments can be upheld as § 5 legislation because the text of the act and amendments and their legislative history do not refer to § 5 specifically or the Fourteenth Amendment generally.

It is true that in passing the original EPA in 1963 (which then covered only private employers) Congress explicitly relied on its Commerce Clause powers. It is also true that in passing the 1974 FLSA Amendments, which extended coverage of the EPA to the states and are at issue here, Congress was silent as to the source of its authority. The defendants thus argue that we should presume Congress acted under its Commerce Clause powers in 1974, just as it did in 1963. However, as we recently stated in rejecting a similar Eleventh Amendment challenge to suits against a State under the Age Discrimination in Employment Act, "the failure of Congress to use the words 'section 5' or 'Fourteenth Amendment' or 'equal protection' is not controlling. As long as Congress could have enacted the [statute] pursuant to § 5, Congress need not have declared its source of power."[3] *Cooper*, 162 F.3d at 777 (internal citations omitted); *see also EEOC v. Wyoming*, 460 U.S. 226, 243-44 n.18 (1983).

[3] In *Close*, we held that a suit under the overtime compensation provision of the FLSA against the State of New York was barred by the Eleventh Amendment. Because the overtime compensation provision of the FLSA was enacted pursuant to the Interstate Commerce Clause, following the Supreme Court's decision in *Seminole Tribe*, we concluded that Congress lacked the power to abrogate New York's sovereign immunity. *See* 125 F.3d at 38-39. However, the overtime compensation provision at issue could not have been enacted pursuant to § 5 of the Fourteenth Amendment, and our decision did not remotely address whether Congress could have enacted the EPA pursuant to § 5. *See Cooper*, 162 F.3d at 777.

Moreover, we agree with those other Circuits that have considered this issue that the EPA, which "prohibit[s] arbitrary sex-based wage disparities," *Varner v. Illinois State Univ.*, 150 F.3d 706, 714 (7th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3469 (U.S. Jan. 11, 1999) (No. 98-1117), constitutes an exercise of Congress's § 5 powers. *See, e.g., Ussery v. Louisiana*, 150 F.3d 431, 436-437 (5th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3337 (U.S. Nov. 3, 1998) (No. 98-739); *Varner*, 150 F.3d at 712-14; *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838 (6th Cir. 1997); *Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

The defendants also argue that the EPA is substantive not remedial legislation, and that in light of the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), such substantive legislation cannot be the basis for abrogating state immunity because it exceeds Congress's § 5 authority. In particular, they point out that the EPA does not require a showing of an employer's purposeful discrimination, which they assert is otherwise required for § 5 legislation. Alternatively, the defendants maintain that the statute does not qualify as remedial because it lacks "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, 521 U.S. at ___, 117 S. Ct. at 2164.

We adopt the reasoning of the Seventh Circuit in *Varner* and hold that the EPA is remedial legislation that satisfies the "congruence and proportionality" test of *City of Boerne*. *See Varner*, 150 F.3d at 714-16. It is true that the EPA does not require an employee to show purposeful discrimination on the part of an employer to recover. However, we note that we have previously held that "disparate impact"

claims under Title VII are appropriate under § 5 even without a showing of purposeful discrimination. *See Guardians Ass'n of the New York City Police Dep't v. Civil Serv. Comm'n*, 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *see also Varner*, 150 F.3d at 714-15; *United States v. City of Chicago*, 573 F.2d 416, 421-24 (7th Cir. 1978). In any event, we disagree with the defendants' argument that the EPA is not remedial legislation because the statute does not require a showing of discriminatory intent. *See Varner*, 150 F.3d at 716 ("[W]e reject the [State's] contention that the Equal Pay Act automatically constitutes inappropriate legislation merely because it proscribes some constitutional conduct."). Congress can enact legislation under its § 5 enforcement powers "which deters or remedies constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne*, 521 U.S. at ___, 117 S. Ct. at 2163.

Finally, the EPA's provisions are not "out of proportion to the harms that Congress intended to remedy and deter." *Varner*, 150 F.3d at 717. Since the EPA provides an employer with four affirmative defenses, including the ability to prove that the wage "differential [is] based on any other factor other than sex," § 29 U.S.C. § 206(d)(1)(iv), the EPA reaches only those wage disparities for which the employee's sex provides the sole explanation. *See Varner*, 150 F.3d at 717; *see also Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310 (2d Cir. 1995) (describing elements of an EPA claim). Thus, the statute is remedial legislation "reasonably tailored to remedy intentional gender-based wage discrimination" and is sufficiently limited in scope to satisfy the *City of Boerne* test. *Varner*, 150 F.3d at 717.

CONCLUSION

For all of the foregoing reasons, the order of the District Court is affirmed.

Order of the United States District Court, Northern District of New York, filed December 15, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DR. JANICE W. ANDERSON, Ph.D.,

Plaintiff,

-against-

Civil Action No.
95-CV-0979

STATE UNIVERSITY OF NEW YORK, COLLEGE AT NEW PALTZ, DR. THOMAS A. BARTLETT, Ph.D., in his official capacity as Chancellor of the State University of New York, DR. ALICE CHANDLER, Ph.D, in her official capacity as President and Chief Administrator of the State University of New York, College at New Paltz, and the BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK,

(TJM) (RWS)

Defendants.

Defendants having moved under Federal Rules of Civil Procedure ("FRCP") 12 (b) (1) and 12 (h) (3) to dismiss certain claims for want of subject matter jurisdiction and having moved under FRCP 56 (b) for summary judgment with respect to all remaining claims, and plaintiff having cross-moved under FRCP 56 (a) for partial summary judgment with respect to defendants' liability under her Equal Pay Act claim, and the Court having considered the papers submitted by the parties with respect to

the aforesaid motions and having heard, on December 8, 1997, oral argument on the motions, and after due deliberation,

IT IS HEREBY ORDERED:

1) Defendants' motion to dismiss plaintiff's claims under the New York Executive Law is granted on the grounds that the Court lacks subject matter jurisdiction over such claims because of the bar of the Eleventh Amendment to the U.S. Constitution.

2) Defendants' motion to dismiss plaintiff's claims under the Equal Pay Act for lack of subject matter jurisdiction because of the bar of the Eleventh Amendment to the U.S. Constitution is denied.

3) Defendants' motion for summary judgment with respect to plaintiff's wage discrimination claim under the Equal Pay Act is denied.

4) Defendants' motion for summary judgment with respect to plaintiff's wage discrimination claim under Title VII of the Civil Rights Act of 1964, as amended, is granted.

5) Defendants' motion for summary judgment with respect to plaintiff's retaliation claims is granted.

6) Defendants' motion for summary judgment with respect to the period for which plaintiff may seek a back pay award is granted to the extent that plaintiff is entitled, if she prevails at trial, to seek back pay with respect to her Equal Pay Act claim for 2 or 3 years (to be determined by the trier of fact) prior to the date she filed her federal complaint.

7) The parties shall stipulate to substitute the named individual defendants who are being sued only in their official capacity for their successor in office.

8) In accordance with 28 U.S.C. § 1292 (b), the Court is of the opinion that the denial of defendants' motion to dismiss under the Equal Pay Act for want of subject matter jurisdiction involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this

portion of the Order may materially advance the ultimate termination of the litigation.

9) In the event defendants take a timely appeal, the Court stays further proceedings pending the final determination of an appeal taken by defendants with respect to the denial of the motion to dismiss.

Dated: Binghamton, NY
December 12, 1997

/S

THOMAS J. MCAVOY
Chief United States District Judge

U.S. District Court–N.D. of N.Y.
FILED
Dec 15, 1997
Lawrence K. Baerman, Clerk

Bench Opinion of the District Court, dated December 8, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DR. JANICE W. ANDERSON, PhD.,

Plaintiff,

-versus- 95-CV-979

(MOTION)

STATE UNIVERSITY OF NEW YORK, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, NY 12207, on MONDAY, DECEMBER 8, 1997, before the HON. THOMAS J. McAVOY, Chief United States District Court Judge.

APPEARANCES:

FOR THE PLAINTIFF:

GLEASON, DUNN, WALSH & O'SHEA

BY: RONALD G. DUNN, ESQ.

FOR THE DEFENDANTS:

HON. LAWRENCE [*sic*] C. VACCO, NYS Attorney General

BY: HOWARD L. ZWICKEL, AAG

So for all of the reasons that we articulated in our brief and in the papers, on the issue of Title VII, I think that summary judgment should be denied.

Let me just briefly comment about the things that we don't oppose. I'm not here to waste the Court's time. It is true and I concede that this Court has made an issue - - issued a decision in a Human Rights case against the State that the Eleventh Amendment does kind of trump me out of court and I recognize that. I have had many discussions with Mr. Zwickel over the last couple of years about that. I had hoped that they would see the wisdom of not allowing me to trot over to State Court and start the same lawsuit over again. For exactly the same thing, for reasons that we don't need to get into here, they have decided not to do that, that's why the claim is still here. Not because we were ignoring the law. That's not the case at all.

Thank you, your Honor.

THE COURT: All right. Well, a Judge recently asked me when I hear these kinds of motions how do I decide them? Do I give the parties a short reason or do I give them a long reason. Well, the short reason is that you're both right and you're both wrong and you're about to suffer through the long reason and I apologize for being long-winded in advance.

As evidenced by your submissions, both of you and both sides are aware of the standard governing a motion for summary judgment. So I'm not gonna review that standard for you now and make this even longer than it's going to be.

At this point in the history of our republic, it's clear that the principles of federalism limit the Court's jurisdiction. For example, the Eleventh Amendment bars most claims against a state or agency of the state in Federal Court absent its consent or Congressional abrogation. See, for example, Pennhurst State

School & Hospital versus Halderman, 465 US 89. As to plaintiff's New York Human Rights Law claim, this Court recently stated, "Nothing in the Human Rights Law provides any basis for finding that New York State has waived Eleventh Amendment immunity thereunder." Pazamickas versus New York State Office of Mental Retardation and Developmental Disabilities, 963 Fed Supp 190 at 196. Accordingly, plaintiff's Human Rights Law claims must be dismissed.

Plaintiff's federal claims will also be barred absent state consent or Congressional abrogation. As to Title VII, it is clear that when Congress amended Title VII in 1972 and extend [*sic*] coverage to the states as employers, Congress properly exercised its power to abrogate Eleventh Amendment immunity under Section 5 of the Fourteenth Amendment. See, for example, Fitzpatrick versus Bitzer, 427 US 445 at 453.

As to the Equal Pay Act, I will call it the EPA from here on in, proper Congressional abrogation is far less clear. In Seminole Tribe versus Florida, 116 S. Ct. 1114 at 1131 and 1132, the Supreme Court stated that Congress has the authority to abrogate the states authority only when it enacts legislation pursuant to Section 5 of the Fourteenth Amendment. The issue here then is whether the Equal Pay Act, the EPA, which amended the Fair Labor Standards Act was extended to state employers pursuant to the Fourteenth Amendment or pursuant to Congress's Article One Commerce Clause power.

Unfortunately, the Second Circuit has not answered this question. However, as pointed out this morning in oral argument, the few Circuit courts that have addressed this issue have held that Congress acted pursuant to Section 5 of the Fourteenth Amendment. Most recently in the Sixth Circuit, in Timmer versus Michigan Department of Commerce, 104 Fed 3d 833, that Court found that Congress both intended to and had the power

to extend the Equal Pay Act for the states. 104 Fed 3d at pages 838 and 839. See also Usery versus Charleston County School District, 558 Fed 2d 1169 at 1170; and Usery versus Allegheny County Institution District, 544 Fed 2d 148 at pages 155 and 156.

District Courts deciding this issue since Timmer have generally followed the Timmer Court's rationale. See Usery versus State of Louisiana, 962 F.Supp. 922, at 928; Gehrt versus University of Illinois at Urbana-Champaign, 974 Fed Supp 1178 at 1189. But see the Larry case pointed out to me by defense counsel, Larry versus Board of Trustees of University of Alabama, 975 Fed Supp 1447 at pages 1449 and 1450. And that court held that Congress did not act pursuant to the Fourteenth Amendment.

As Judge Gershon of the Eastern District recently has done, see Perdue versus City University of New York, 93-CV-5939, this Court also finds that the EPA is an exercise of Congress's Fourteenth Amendment power thus abrogating the State's Eleventh Amendment immunity.

However, in light of the exceptionally complex questions presented by this issue, the Court hereby certifies this issue for immediate interlocutory appeal to the Second Circuit should the defendants choose to exercise those appeal rights.

That's why I made that crack about the Second Circuit a little earlier. You now see.

(Laughter)

THE COURT: Both sides seek summary judgment on plaintiff's Equal Pay Act claim. To make out a claim of salary discrimination based on sex under the EPA, 29 U.S. Code,

Section 206(d), a plaintiff must demonstrate that, one, the employer pays different wages to employees of the opposite sex; two, the employees perform equal work on jobs requiring equal skill, effort and responsibility; and three, the jobs are performed under similar working conditions. Tomka versus Seiler Corporation, 66 Fed 3d 1295 at 1310.

Under the EPA, a plaintiff need not demonstrate that her job is identical to a higher-paid position but must show that the two positions are substantially equal. Jobs which are merely comparable are insufficient to satisfy a plaintiff's prima facie burden. Tomka at 1310. However, unlike Title VII, under the EPA, a plaintiff need not prove an employer intended to discriminate against her in order to prevail on her claim. Tomka at 1310.

Once the plaintiff makes out a prima facie case, the burden of persuasion shifts to the employer to prove that the disparity is justified by one of four affirmative defenses: One, a merit system; two, a seniority system; three, a system which measures earnings by quantity or quality of production; or four, a differential based on any other factor other than sex. 29 United States Code, Section 206(d) sub (1). See also Corning Glass Works versus Brennan, 94 S. Ct. 2223 at 2229. If an employer attempts to justify a pay differential based on a factor other than sex, it must also prove that the gender-neutral factor was adopted for a legitimate business reason. Tomka at 1310.

Here, there is little doubt that plaintiff has demonstrated a genuine issue of material fact as to the first and third prongs of the Equal Pay Act test: Defendants pay different wages to employees of the opposite sex, and the jobs are performed under similar working conditions. However, the parties strongly contest the second prong necessary to establish liability under the EPA: That the employees performed equal work on jobs requiring equal skill, effort and responsibility.

Plaintiff argues that each faculty member in the communications department teaches the same number of courses, is expected to advise students and is expected to perform research. Thus, she asserts that as an assistant professor, she performed work that was substantially equal to that of every other assistant professor in the communications department. In response, defendants argue that the other assistant professors at issue here have different specialities than plaintiff's and were hired to perform additional duties beyond those required of plaintiff.

Moreover, defendants argue that any salary discrepancies are due to factors other than sex and are based on legitimate business reasons. As defendants correctly note, employers may reward professional experience and education without violating the EPA. Stanley v. University of Southern California, 13 Fed 3d 1313 at 1322. Defendants claim to consider a variety of factors in determining starting salary, including experience, education, work and salary history and salary requested. However, as evidenced by plaintiff's extensive opposition on this point, the relative value of one employee over another is a highly fact-intensive determination. Accordingly, defendants' evidence merely races [*sic*] a fact issue as to whether all or any of these factors can explain and justify the wage differentials between plaintiff and her co-workers.

After reviewing the record submitted by the parties, the Court concludes that plaintiff has made out a prima facie case of salary discrimination under the EPA. Plaintiff has not, however, shown that she's entitled to judgment as a matter of law on this issue. Instead, this is an issue properly left for the trier of the fact to decide if plaintiff is entitled to relief. Thus, both parties' motions for summary judgment on this issue must be denied.

Now, Title VII protects against, among other things, disparate treatment of employees due to sexual discrimination. An

employer consequently is prohibited from discharging or otherwise discriminating against an individual on the basis of gender. See 42 U.S. Code, Section 2000e-2(a). In the Second Circuit, Title VII cases are analyzed under the familiar framework of McDonnell Douglas Corporation versus Green, 411 US 792. Once a plaintiff has made out a prima facie case, the burden shifts to the employer to articulate a legitimate explanation for the disparate treatment. St. Mary's Honor Center versus Hicks, 113 S.Ct. 2742 at 2747.

If the employer satisfies this burden, the plaintiff must then prove that such explanations are a mere pretext for discrimination. Hicks at 2747. However, the burden of persuasion remains with the plaintiff at all times.

A claim of unequal pay for equal work under Title VII is generally analyzed under the same standards used in an EPA claim. Tomka at 1312. Moreover, Title VII explicitly incorporates the four exceptions in the EPA, so that the employer vindicated under the EPA cannot be held liable under Title VII. See 42 U.S. Code Section 2000e-2(h). However, if a plaintiff sues under Title VII, she must also produce evidence that her wages were depressed because of intentional sex discrimination. County of Washington versus Gunther, 101 S.Ct. 2242 at 2246.

As the Court previously noted, plaintiff has made out a prima facie case of wage discrimination under the EPA. The only issue that remains is whether she has shown the requisite discriminatory animus necessary under Title VII. Under Title VII, discrimination can be demonstrated through evidence of either disparate treatment or disparate impact. See Cosgrove versus Sears, Roebuck & Company, 9 Fed 3d 1033 at 1041. To show disparate treatment, the plaintiff is required to prove that the defendant had a discriminatory intent or motive. Watson versus Fort Worth Bank & Trust, 487 US 977 at 986. Disparate impact, on the other hand, is based on the premise that some

employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination. Watson at 987. The evidence of disparate impact cases usually focuses on statistical disparities rather than specific incidents and on competing explanations for those disparities. Watson at 986 and 987.

Here, plaintiff's expert, Dr. Kavanaugh, concludes that based on a statistical analysis of all male and female faculty in the communication department that plaintiff's salary is low due to sex discrimination. Although defendants proffer an expert who concludes that the statistics do not support sex discrimination, in light of plaintiff's de minimis burden at this stage, the Court finds the plaintiff made out a prima facie case under Title VII.

At this point, if defendants articulate a nondiscriminatory reason, the presumption raised by the prima facie case is rebutted and the factual inquiry proceeds to a new level of specificity. Texas Department of Community Affairs versus Burdine, 101 S.Ct. 1089 at 1095. Defendants offer a host of nondiscriminatory reasons why plaintiff's salary is less than her male counterparts in the communications department. As previously stated, unlike the EPA, where the defendant bears both the burden of production and persuasion in establishing an affirmative defense, under Title VII the defendant only bears the burden of articulating a nondiscriminatory justification for a salary disparity. Pollis versus New School for Social Research, 913 Fed Supp 771 at 784; reversed in part on other grounds, 1997 Westlaw 736105. Moreover, the defendant need not persuade the Court that it was actually motivated by the proffered reasons; any legitimate, nondiscriminatory reason will rebut the presumption triggered by the prima facie case. Fisher versus Vassar College, 114 Fed 3d 1332 at 1336.

Consequently, the Court finds the defendants have rebutted plaintiff's prima facie Title VII claim. Therefore, plaintiff's burden is enlarged to include every element of the claim; discrimination and cause are no longer presumed. Fisher at 1337. Plaintiffs must now demonstrate that defendants' proffered reasons are merely pretext. See Sutera versus Schering Corporation, 73 Fed 3d 13 at page 16, and that her sex played a motivating role in or contributed to the employer's decision. Renz v. Grey Advertizing, Inc. - - happy to note to you gentlemen I sat on the Second Circuit in that case so they couldn't reverse me that time - - 1997 Westlaw 433675 at *4. On this issue, we have the proverbial dueling experts. Each expert has proffered statistics, tables and conclusions. Although the Court is cautious in accepting statistics as a substitute for direct proof of discriminatory animus, it is well settled that an individual disparate treatment plaintiff may use statistical evidence regarding an employer's general practices at the pretext stage to help rebut the employer's purported nondiscriminatory explanation. Hollander versus American Cyanamid Company, 895 Fed 2d 80 at page 84.

Although plaintiff's statistics indicate that New Paltz paid Anderson less than her male colleagues, her statistics are not sufficient to show that sexual discrimination played a motivating role in determining her salary. For example, her statistics do not appear to account for the many neutral factors that operate simultaneously to influence the amount of salary a faculty member receives. Wilkins versus University of Houston, 654 Fed 2d 388, page 402. These factors include quality of prior experience, education, length of service and professional achievements. See, for example, Tagatz versus Marguette University, 681 Fed Supp 1344, 1358; affirmed, 861 F.2d 1040, finding there that the plaintiff's statistics fail to account for a variable such as how many books were published by a professor, how many grants a professor obtained, how many graduate students a professor advised or the level of student evaluations.

Just two weeks ago, the Second Circuit voiced serious concerns regarding the use of statistical evidence like that used here to support a finding of discrimination. I already stated to you, that's the Pollis case that I did cite. In Pollis, the plaintiff presented a statistical analysis of eight graduate faculty professors who were subjected to mandatory retirement between 1974 and 1993. The Second Circuit reversed the lower Court's findings stating, quote, "We will not impute discrimination in the terms of employment on the basis of circumstantial evidence that has no logical tendency to show that discrimination was present. Once a Title VII defendant has answered the minimal requirements of the prima facie case by proffering a nondiscriminatory explanation, plaintiff must point to evidence that can reasonably support the inference by a preponderance of the evidence that the defendant's conduct was attributable to the prohibited discriminatory motivation. See, Fisher, 114 Fed 3d at 1337. If the plaintiff seeks to prove the discrimination by statistical evidence, however, the statistics must support reasonably the inference that the employer's adverse decision would not have occurred but for discrimination. Pollis's statistical evidence is too scant and too flawed to support such an inference." Pollis, 1997 Westlaw 736105 at *8.

Taken as a whole, plaintiff's statistical proof fails to meet this burden. The Court recognizes that this is a difficult standard, but if we do not adhere to it, we will risk substituting our uninformed judgment for the employer's essentially subjective assessment of the value of the differing duties and responsibilities of various academic positions. Tagatz at 1358. Accordingly, plaintiff's Title VII claim must fail.

Retaliation and reprisal is another form of disparate treatment under Title VII. Section 704 (a) of Title VII provides that it shall be an unlawful employment practice for an employer to discriminate against any of its employees because the employee

has opposed any practice made an unlawful employment practice. 42 U.S. Code Section 2000e-3(a).

The components of a prima facie case for retaliation or reprisal differ slightly from those for discrimination. A plaintiff alleging discriminatory retaliation must show that she engaged in a statutorily protected activity; that the employer was aware of the plaintiff's participation in the activity; that the employer took an adverse employment action; and that a causal connection existed between the protected activity and the adverse action. Manoharan versus Columbia University college of Physicians and Surgeons, 842 Fed 2d 590, 593.

Here, plaintiff has failed to offer any probative evidence that a casual connection existed between her complaining of wage disparities and an adverse action on the part of the defendants. Conclusory allegations are not sufficient to withstand summary judgment. Consequently, plaintiff's retaliation claim must be dismissed.

As a final issue, plaintiff argues that she is entitled to damages covering her entire period of employment based on the continuing violation theory. Under 29 U.S. Code, Section 255(a), a claim under the Equal Pay Act must be commenced within two years of its accrual, or three years if the violation is willful. Back pay awards for Equal Pay Act violations are typically limited to damages sustained within this period. See Ashley v. Boyle's Famous Corned Beef Company, 66 Fed 3d 164 at 168.

Although the question of the applicability of the continuing violation theory in an Equal Pay Act case may have been open to argument, the Second Circuit's recent decision in Pollis has ended the dispute. In Pollis, the Circuit stated that a cause of action based upon receipt of a paycheck prior to the limitations period is untimely and recovery for pay differentials prior to the limitations period is barred irrespective of subsequent, similar

timely violations. 1997 Westlaw 736105 at *3. Accordingly, plaintiff's recovery is limited to damages incurred within the two-year limitations period, or if a jury finds that the defendants acted willfully or recklessly, within a three-year limitations period.

Lastly, the defendants seek to have Thomas Bartlett and Alice Chandler dismissed because they are no longer employed by SUNY. Because plaintiffs have sued these defendants in their official capacities, the Court expects plaintiffs to file a stipulation of substitution naming their successors.

So, in summary, defendants' motion for summary judgment is granted in part. Plaintiff's cross-motion is denied in its entirety. Plaintiff's Title VII discriminations claim, Title VII retaliation claim and Human Rights Law claim are dismissed.

So, if the defendant will submit an order. I take it when you appeal the Fourteenth Amendment issue that you're gonna cross-appeal the issue of dismissal of the Title VII claim.

MR. ZWICKEL: He may not be able to, your Honor.

THE COURT: He might try.

MR. ZWICKEL: And we haven't decided on appeal. But thank you very much.

THE COURT: Very interesting. Good jobs on both sides.

MR. ZWICKEL: Thank you.

- - - - - -

CERTIFICATION

I, THERESA J. BERICAL, CSR, RPR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading thereof; that I did make a stenographic record of the proceedings held in this matter and cause the same to be transcribed; that the foregoing is a true and correct transcript of the same and the whole thereof.

/S

Theresa J. Berical, CSR, RPR
Official Court Reporter

Dated: December 15th, 1997

Amended Complaint and Demand for Jury Trial, dated August 8, 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DR. JANICE W. ANDERSON, Ph.D.,

Plaintiff,

-against-

Civil Action
Case No.
95-CV-0979
(TJM/RWS)

STATE UNIVERSITY OF NEW YORK, COLLEGE AT NEW PALTZ, DR. THOMAS A. BARTLETT, Ph.D., in his official capacity as Chancellor of the State University of New York, Dr. ALICE CHANDLER, Ph.D., in her official capacity as President and Chief Administrator of the State University of New York, College at New Paltz, and the BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK,

Defendants.

DR. JANICE W. ANDERSON, Ph.D., residing at 15 Stirrup Drive, Newburgh, New York 12550, by her attorneys, GLEASON, DUNN, WALSH & O'SHEA, respectfully alleges upon information and belief:

INTRODUCTORY AND JURISDICTIONAL STATEMENT

1. This is an action alleging discrimination in employment in violation of 29 U.S.C. §§ 201 et seq. (Hereinafter "Equal Pay Act"), 42 U.S.C. §2000e-2 (hereinafter "Title VII"), and the New York State Executive Law §§ 290 et seq. (Hereinafter "Human Rights Law").

2. The jurisdiction of the Court is invoked pursuant to 29 U.S.C. §216 (b), 42 U.S.C. §2000e-5 (a) and 28 U.S.C. §1331.

3. Plaintiff asserts that the claims under the Human Rights Law prohibiting sex discrimination arise from the same set of facts and circumstances as are claimed under the Equal Pay Act and Title VII. Thus, the jurisdiction of this Court is invoked pursuant to the doctrine of pendant jurisdiction.

4. Plaintiff demands a jury trial of this action.

5. Venue in this case is set in the Northern District of New York based on the location of the campus of the State University of New York, College at New Paltz, in Ulster County. Upon information and belief, principal decisions affecting this case were made at the New Paltz Campus located in Ulster County in the Northern District of New York.

PARTIES

6. Plaintiff Dr. Janice W. Anderson, Ph.D. ("Dr. Anderson") is a female over the age of 21 and a resident of Orange County, State of New York. Dr. Anderson is employed as a full-time faculty member at the State University of New York, College at New Paltz, with the title of Assistant Professor.

7. The State University of New York, College at New Paltz ("SUNY New Paltz"), is a college within the State University of New York. The State University of New York is a corporation within the Education Department and University of the State of New York created pursuant to the New York State Education

Law, Title I, Sections 201 and 352. At all times relevant to this case, Dr. Anderson has been employed at SUNY New Paltz.

8. Defendant Dr. Thomas A. Bartlett, Ph.D. ("Dr. Bartlett") is the duly elected Chancellor of the State University of New York with all the duties and responsibilities set forth in and defined by the New York State Education Law and other state laws and statutes. As Chancellor, Dr. Bartlett presides at all meetings of the Board of Trustees and is the Chief Executive Officer for the State University of New York. Dr. Bartlett is sued in his official capacity only.

9. Defendant the Board of Trustees of the State University of New York ("Board of Trustees") is the governing body of the State University as set forth in Section 353(1) of the New York State Education Law. Chancellor Bartlett was elected Chancellor by vote of the Board of Trustees. The duties of the Board of Trustees include the oversight over personnel matters affecting faculty at colleges within the State University and the creation and publication of rules, regulations and policies concerning salary, compensation, appointments and promotions for full-time faculty, including Dr. Anderson, in the State University.

10. Defendant Alice Chandler, Ph.D. ("President Chandler") is the President and Chief Administrator of SUNY New Paltz with her powers and duties set forth in the New York State Education Law, regulations passed pursuant to the Education Law, and other state statutes and regulations. President Chandler is appointed by the Board of Trustees. President Chandler has overall supervisory authority over the faculty at SUNY New Paltz. President Chandler's duties include approving appointments and promotions of teaching faculty and to review levels of compensation for all SUNY New Paltz faculty to ensure compliance with applicable state and federal laws governing the setting of salaries and compensation at all levels free of gender discrimination.

11. SUNY New Paltz and the Board of Trustees are "employers" of Dr. Anderson as that term is defined and applied

pursuant to the Equal Pay Act, Title VII and the Human Rights Law.

12. SUNY New Paltz and the Board of Trustees have the statutory duty pursuant to the U.S. Education Law Title IX, 20 U.S.C. §1681, Title VII, the Equal Pay Act and the Human Rights Law, to set salaries and benefits without reliance on gender-based discrimination.

13. Defendants Dr. Bartlett and President Chandler are named in their official capacities as Chief Executive and Chief Administrator respectively to assure full and complete relief.

PROCEDURAL HISTORY

14. Dr. Anderson filed a charge with the New York State Division of Human Rights (hereinafter "SDHR") in and about March 1994 alleging that she had been discriminated against at her place of employment on the basis of her sex.

15. Pursuant to Title VII and contracts entered into between the SDHR and the Equal Employment Opportunity Commission (hereinafter, "EEOC"), the complaint filed with SDHR was concurrently filed with the EEOC.

16. SDHR dismissed the complaint on the basis of administrative convenience pursuant to New York State Executive Law Section 297(9) with an order dated March 1, 1995, thereby granting Dr. Anderson the right to pursue her Human Rights Law remedies in Court.

17. The EEOC issued Dr. Anderson a right-to-sue letter concerning these allegations dated May 5, 1995. The right-to-sue letter was received on or about May 8,1995.

FACTUAL ALLEGATIONS

18. Dr. Anderson received her Ph.D. from Pennsylvania State University in 1984.

19. Dr. Anderson was originally hired by SUNY New Paltz as an Assistant Professor in 1984. At the time of her original appointment, Dr. Anderson was given assurances that she would be considered for a "continuing appointment" after an appropriate evaluation period. Since 1984, Dr. Anderson has been assigned to and taught in the Communication Department at SUNY New Paltz.

20. In 1991 Dr. Anderson received a "continuing appointment" with the rank of Assistant Professor. That "continuing appointment," otherwise known as tenure, entitles Dr. Anderson to an expectation of a continuing appointment until her resignation, retirement or termination.

21. At the time of her original appointment continuing up to the present, Dr. Anderson has consistently been paid less than male faculty at SUNY New Paltz, within the Communication Department with the same or less academic rank, academic credentials, years of service at SUNY New Paltz, teaching experience, quantity and quality of research, workload, and classroom teaching effectiveness.

22. Dr. Anderson's workload, as defined by the Policies of the Board of Trustees and the current collective bargaining agreement governing teaching faculty at SUNY New Paltz, is comparable to or greater than the workload of all other comparably qualified male Assistant Professors in the Communication Department.

23. Dr. Anderson's teaching effectiveness is comparable to or greater than that of any other male Assistant Professor in the Communication Department.

24. Dr. Anderson maintains a mastery of her subject matter as evidenced by her Ph.D., the number of speaking engagements she is invited to present with respect to her specialty and the frequency of requests for consultations by outside persons as an expert in her field. Such mastery is comparable to or greater than that of any other male Assistant Professor in the Communications Department.

25. Dr. Anderson's publication record is comparable to or greater than that of any other male Assistant Professor or Associate Professor in the Communication Department.

26. Dr. Anderson's University service records are comparable to or greater than those of any other male Assistant Professor or Associate Professor in the Communication Department.

27. Dr. Anderson's scholarly ability is comparable to or greater than that of any other male Assistant Professor or Associate Professor in the Communication Department.

28. Dr. Anderson's continuing growth in her academic endeavors as evidenced by her receipt of a continuing appointment, her research and her meeting attendance is comparable to or greater than that of any other male Assistant Professor in the Communication Department.

29. No male in Dr. Anderson's Department at SUNY New Paltz makes less money than she does.

30. Upon information and belief, Dr. Anderson makes significantly less per year than Harrell, a male Assistant Professor without continuing appointment status in the Communication Department. Harrell was hired in 1992, at a point before he had completed a Ph.D.

31. Upon information and belief, Dr. Anderson makes significantly less per year than Auster, a male Assistant Professor without continuing appointment status in the Communication Department. Auster was hired in 1989.

32. Upon information and belief, Dr. Anderson makes significantly less than Volin, a male Assistant Professor without continuing appointment status in the Communication Department. Volin was hired in 1989.

33. Upon information and belief, all of the women in Dr. Anderson's Department made less money than their male counterparts with comparable qualifications and experience.

34. Upon information and belief, the Communication Department at SUNY New Paltz has a two-tiered salary structure based on sex. Qualified women are paid less than men with comparable qualifications and experience for comparable work.

35. Upon information and belief, the average salary of males teaching in the Communication Department is significantly higher

than the average salary of females teaching in the Communication Department.

36. As early as 1991, and continuing up to the present, Dr. Anderson has repeatedly brought to the attention of her supervisors and responsible officials at SUNY New Paltz the illegal gender-based differences in workload, salary and benefits between male and female faculty in the Communication Department.

37. In January 1993 plaintiff's Department voted to deny Dr. Anderson a merit increase in salary, upon information and belief, in retaliation for her complaints about the workload and salary inequities in her Department.

38. Defendants, through their representatives, retaliated against Dr. Anderson for her complaints concerning gender-based discrimination by withholding certain benefits and emoluments of employment that other employees received.

39. Defendants continue to pay Dr. Anderson a salary which is less than the salary paid to other male faculty in the Communication Department with equal or less academic rank, equal or less years of service, equal or less quantity or quality of publications, equal or less effectiveness in classroom instruction, equal or less qualifications and equal or less experience.

40. Defendants continue to pay Dr. Anderson a salary which is significantly lower than the salary paid to male faculty in the Communication Department with comparable academic rank, years of service, quality and quantity of publications, effectiveness of classroom instruction, qualifications and experience.

41. Defendants knew, or should have known, that their practice of paying Dr. Anderson a salary which was lower than the salary paid to male faculty of equal academic rank and equal qualifications and experience was illegal.

42. Defendants took no steps to eliminate the sexually discriminatory disparities between the salary of Dr. Anderson and those of similarly situated male faculty members.

43. Dr. Anderson suffered, and continues to suffer, severe financial and economic losses as a result of defendants' conduct.

44. Dr. Anderson suffered, and continues to suffer, emotional damages and damages to her professional reputation as a result of defendants' conduct.

AS AND FOR A FIRST CAUSE OF ACTION

45. The acts of the defendants in sexually discriminating against Dr. Anderson violate Title VII.

AS AND FOR A SECOND CAUSE OF ACTION

46. The acts of defendants in paying Dr. Anderson a salary which is less than the salary paid to male employees within the Communication Department with equal or less academic rank, qualifications and experience for work which is equal to the work performed by Dr. Anderson violate the Equal Pay Act.

AS AND FOR A THIRD CAUSE OF ACTION

47. The acts of defendants in discriminating against Dr. Anderson based on her sex violate the provisions of the Human Rights Law.

AS AND FOR A FOURTH CAUSE OF ACTION

48. The acts of the defendants in retaliating against Dr. Anderson for her complaints about sexual discrimination violate Title VII.

AS AND FOR A FIFTH CAUSE OF ACTION

49. The acts of defendants in retaliating against Dr. Anderson for her complaints about the lack of equal pay for equal work violate the Equal Pay Act.

AS AND FOR A SIXTH CAUSE OF ACTION

50. The acts of defendants in retaliating against Dr. Anderson for her complaints about sex discrimination violate the Human Rights Law.

RELIEF

WHEREFORE, plaintiff respectfully requests that the Court grant the following relief as to claims one through three:

1. ORDER, ADJUDGE and DECREE the defendants' conduct in allowing sexual discrimination in setting Dr. Anderson's salary is a violation of the prohibition of sexual discrimination in the workplace as prohibited in 42 U.S.C. §2000e-2(a); and

2. ORDER, ADJUDGE and DECREE that defendants' conduct in failing to pay Dr. Anderson a salary equal to that of the salary paid to male faculty in the Communication Department of equal or less academic rank, qualifications and experience is prohibited by 29 U.S.C. §§ 201 et seq.; and

3. ORDER, ADJUDGE and DECREE that defendants' conduct in allowing sexual discrimination in setting Dr. Anderson's salary and compensation is a violation of the New York State Executive Law §§ 290 et seq.; and

4. ORDER, ADJUDGE and DECREE that defendants' conduct in retaliating against Dr. Anderson for her complaints of sexual discrimination constitute illegal retaliation as prohibited by 42 U.S.C. §2000-e-3(a); and

5. ORDER, ADJUDGE and DECREE that defendants' conduct in retaliating against Dr. Anderson for her complaints concerning equal pay for equal work constitutes illegal retaliation in violation of the Equal Pay Act 29 U.S.C. §215 (a) (3); and

6. ORDER, ADJUDGE, and DECREE that defendants' conduct in retaliating against Dr. Anderson for her complaints about sexual discrimination constitute illegal retaliation in violation of the New York State Executive Law §§ 296 (1) (e) and 3-a(c).

7. ORDER, ADJUDGE and DECREE that Dr. Anderson's salary be increased prospectively to that equal to the salary paid to male faculty in the Communication Department with comparable and/or equal academic rank, experience and qualifications; and

8. Award Dr. Anderson back pay, benefits and other emoluments of employment; and

9. Award Dr. Anderson liquidated damages in an amount equal to the back pay awarded; and

10. Award Dr. Anderson compensatory damages in an amount to be determined by the jury, but for the purposes of this complaint, set at $100,000.00; and

11. Award Dr. Anderson punitive damages in an amount to be determined by the jury, but for the purposes of this complaint set at $100,000.00; and

12. Award Dr. Anderson the costs and disbursements of this action, including an award of attorneys' fees; and

13. Such other and further relief as to the Court seems just.

Dated: August 8, 1995
Albany, New York

GLEASON, DUNN, WALSH & O'SHEA

By: /S

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Pertinent Sections from Fair Labor Standards Act

FAIR LABOR STANDARDS ACT
29 U.S.C.§§ 201, *et seq.*

§203. Definitions

As used in this chapter—

* * * * *

(e) (1) Except as provided in paragraphs (2), (3), and (4) the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the Government Printing Office;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) an individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policy making level,

(IV) is an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

* * * * *

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

§ 206. Minimum Wage

* * * * *

Prohibition of sex discrimination

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

§ 216. Penalties

* * * * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215 (a) (3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215 (a) (3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under

the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215 (a) (3) of this title.

Supreme Court, U.S.
FILED
JUN 15 1999
CLERK

(2)

No. 98-1845

In the Supreme Court of the United States

STATE UNIVERSITY OF NEW YORK, COLLEGE AT NEW PALTZ, ET AL., PETITIONERS

v.

DR. JANICE W. ANDERSON, PH.D.

AND

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15PP

QUESTION PRESENTED

Whether Congress's abrogation of the States' Eleventh Amendment immunity in the Equal Pay Act of 1963, 29 U.S.C. 206(d), falls within Congress's power under Section 5 of the Fourteenth Amendment.

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DR. JANICE W. ANDERSON, PH.D.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 169 F.3d 117. The order and bench opinion of the district court (Pet. App. 11a-13a, 14a-26a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 24, 1999. The petition for a writ of certiorari was filed on May 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, the Board of Trustees of the State University of New York, the State University of New York College at New Paltz, and various school officials, employ respondent. Pet. App. 3a-4a. She filed suit alleging that petitioners paid her less than similarly situated male employees in violation of the Equal Pay Act of 1963, 29 U.S.C. 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and that petitioners retaliated against her for complaints about the pay disparity. Pet. App. 33a-35a.[1]

Petitioners moved to dismiss the claims on the ground that the Eleventh Amendment barred them. The district court denied the motion to dismiss the federal claims, concluding that both the Equal Pay Act and Title VII contain valid abrogations of the States' Eleventh Amendment immunity. Pet. App. 16a-17a.[2]

2. Petitioners took an interlocutory appeal of the denial of Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). Shortly after learning of petitioners' constitutional challenge, the United States moved to intervene on appeal as of right, pursuant to 28 U.S.C. 2403(a),[3] to defend the constitutionality of Con-

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[1] Respondent also filed two state law claims, which the district court dismissed. Pet. App. 15a-16a.

[2] The district court denied petitioners' motion for summary judgment on the Equal Pay Act claim, but granted it for the Title VII and retaliation claims. Pet. App. 18a-24a.

[3] Section 2403(a) provides:

> In any action, suit, or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in

gress's abrogation of Eleventh Amendment immunity. Petitioners opposed the United States' intervention. The court of appeals' docket sheet reflects that the court accepted the United States' brief for filing. The court of appeals never issued an order regarding the United States' intervention, however. While the opinion of the court identifies the United States as an intervenor, Pet. App. 2a-3a, the docket sheet refers to the United States as an amicus curiae. Because Section 2403(a) affords the United States an unconditional right to intervene, the United States considered itself a party to the proceedings in the court of appeals and continues to assert that status before this Court.[4]

The court of appeals affirmed the district court's denial of petitioners' motion to dismiss on Eleventh Amendment grounds. Pet. App. 1a-10a. Pursuant both to petitioners' concession and circuit precedent, the court ruled that the Equal Pay Act contains a clear statement of Congress's intent to abrogate the States' Eleventh Amendment immunity. *Id.* at 6a. The court also held that the Equal Pay Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity. *Id.* at 7a-10a. The court explained that the Equal Pay Act's burden-shifting scheme—in which plaintiffs must show that the employer pays different wages to employees of the opposite sex for equal work, and then

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question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

[4] Should there be any question about the matter, however, the United States requests that the Court accept this brief in opposition as notice of the United States' intervention in this case before this Court.

defendants must show that the differential is based on any factor other than sex—"reaches only those wage disparities for which the employee's sex provides the sole explanation" and thus is "reasonably tailored to remedy intentional gender-based wage discrimination." *Id.* at 9a.

ARGUMENT

The court of appeals' ruling that the Equal Pay Act validly abrogated the States' Eleventh Amendment immunity is correct and consistent with the decisions of this Court and every other court of appeals that has addressed the question. Accordingly, further review is unwarranted.

A. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that the question whether Congress has abrogated Eleventh Amendment immunity in particular legislation contains two elements: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' * * * and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)). Petitioners concede that Congress clearly expressed its intention to abrogate the States' Eleventh Amendment immunity in the Equal Pay Act. Pet. 5 n.1; Pet. App. 6a.[5]

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[5] Eight other courts of appeals have also held that the definitional and enforcement provisions of the Equal Pay Act contain the necessary "clear statement" of congressional intent to abrogate the States' Eleventh Amendment immunity. See *Mills* v. *Maine*, 118 F.3d 37, 42 (1st Cir. 1997); *Abril* v. *Virginia*, 145 F.3d 182, 186 (4th Cir. 1998); *Ussery* v. *Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998), cert. dismissed, 119 S. Ct. 1161 (1999); *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 837-838 (6th Cir. 1997); *Varner* v. *Illinois State Univ.*, 150 F.3d 706, 710 (7th Cir. 1998), petition for cert. pending, No. 98-1117; *Humenansky* v. *Regents of the Univ. of*

Petitioners contend (Pet. 12-14), however, that Congress lacked the legislative authority to effect that abrogation because the Equal Pay Act is not an appropriate exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 59, 65-66 (Section 5 of the Fourteenth Amendment grants Congress the power to abrogate the Eleventh Amendment); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). That claim does not merit this Court's review.

First, as petitioners concede (Pet. 11), every court of appeals that has addressed the question has ruled that the extension of the Equal Pay Act to the States was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Ussery* v. *Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998), cert. dismissed, 119 S. Ct. 1161 (1999); *Varner* v. *Illinois State Univ.*, 150 F.3d 706, 709-717 (7th Cir. 1998), petition for cert. pending, No. 98-1117; *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 838-839 (6th Cir. 1997); *Usery* v. *Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery* v. *Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).[6]

Minn., 152 F.3d 822, 825 (8th Cir. 1998), petition for cert. pending on other grounds, No. 98-1235; *Hale* v. *Arizona*, 993 F.2d 1387, 1391-1392 (9th Cir.) (en banc), cert. denied, 510 U.S. 946 (1993); *Aaron* v. *Kansas*, 115 F.3d 813, 814-815 (10th Cir. 1997).

[6] We are aware of appeals involving the validity of the Equal Pay Act's abrogation pending in two other circuits. See *Larry* v. *Board of Trustees*, 975 F. Supp. 1447 (N.D. Ala. 1997), aff'd on reconsideration, 996 F. Supp. 1366 (1998), appeal pending, No. 98-6532 (11th Cir.) (argued Mar. 23, 1999); *O'Sullivan* v. *Minnesota*, No. 98-2706 (8th Cir.) (argued May 13, 1999).

Petitioners point (Pet. 8) to "disarray" in the circuits regarding the constitutionality of Congress's abrogation of Eleventh Amendment immunity in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* This Court, however, has already granted certiorari to resolve that conflict in cases that (unlike petitioners') actually present that question. See *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791. The utter lack of disarray or even substantive disagreement in the appellate decisions analyzing the Equal Pay Act thus stands in sharp contrast to the Section 5 issues presented by other legislation and counsels strongly against further review.

Second, contrary to petitioners' argument (Pet. 12-14), the court of appeals correctly concluded that the Equal Pay Act falls squarely within Congress's power under Section 5 of the Fourteenth Amendment. The Equal Pay Act prohibits employers from paying workers of one sex more than workers of the opposite sex for performing equal work. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). Once an employee has proven equal work and unequal pay, an employer bears the burden of persuasion (if it chooses to mount an affirmative defense) to show that the difference is not based on sex. See *id.* at 196-197. In essence, Congress has established a rebuttable presumption that unequal pay of opposite sex employees for equal work is intentional sex discrimination, but permits employers to rebut that presumption by showing that the actual cause of the disparity is a factor other than sex.

B. Petitioners argue (Pet. 12) that the Equal Pay Act falls beyond Congress's power under Section 5 because it permits the imposition of liability without the show-

ing of intentional discrimination that the Equal Protection Clause requires, see, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229 (1976). In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), however, this Court reaffirmed that, when enacting remedial or preventive legislation under Section 5, Congress is not limited to prohibiting unconstitutional activity. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 518. Similarly, in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), *City of Rome* v. *United States*, 446 U.S. 156 (1980), and most recently in *Lopez* v. *Monterey County*, 119 S. Ct. 693 (1999), this Court upheld the constitutionality of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect, even if no discriminatory intent is shown. *South Carolina* v. *Katzenbach*, 383 U.S. at 324-337; *City of Rome*, 446 U.S. at 177; *Lopez*, 119 S. Ct. at 703.[7] Indeed, in *Flores*, the Court expressly reaffirmed that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause." 521 U.S. at 529 (citing *City of Rome*, *supra*, and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (plurality opinion)). Congress's authority to prevent sex discrimination is equally broad.

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[7] See also *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986); *Mississippi Republican Exec. Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.) (upholding 1982 amendments to the Voting Rights Act that permitted challenges based on the discriminatory effects of voting practices, even though the Court had ruled that discriminatory effects alone do not violate the Fourteenth Amendment).

Moreover, unlike the statute at issue in *Flores*, which imposed a strict scrutiny standard on all state action even though there was little evidence of widespread constitutional violations, 521 U.S. at 530-533, the Equal Pay Act addresses the discrete problem of gender discrimination in salaries by establishing a remedial scheme that is carefully tailored to detecting and preventing those acts (unequal pay for equal work) most likely to be the result of such unlawful discrimination. Also unlike *Flores*, in which the Court found the "legislative record lack[ed] examples of modern instances" of intentional discrimination, *id.* at 530, Congress enacted the Equal Pay Act based on a record that employers were intentionally and systematically paying women less than men for equal work.[8] Like their private counterparts, States have engaged in a long history of discrimination on the basis of sex. See *United States* v. *Virginia*, 518 U.S. 515, 531-534 (1996).[9] Indeed, in extending Title VII to the States just two years before it extended the Equal Pay Act, Congress found evidence of sex discrimination by public employers.[10] This

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[8] See S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963); H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962); S. Rep. No. 2263, 81st Cong., 2d Sess. 2, 4 (1950); S. Rep. No. 1576, 79th Cong., 2d Sess. 2-3 (1946); *Corning Glass Works*, 417 U.S. at 195; see also *Kahn* v. *Shevin*, 416 U.S. 351, 353 (1974) (finding that "firmly entrenched practices" made "the job market * * * inhospitable to the woman seeking any but the lowest paid jobs").

[9] Cf. *Jefferson County Pharmaceutical Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 158 (1983) ("economic choices made by public corporations * * * are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders").

[10] See S. Rep. No. 415, 92d Cong., 1st Sess. 7-8, 12 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 4-5, 20 (1971); see also *North*

"information and expertise that Congress acquires in the consideration and enactment of earlier legislation," *Fullilove*, 448 U.S. at 502-503 (opinion of Powell, J.), provides more than sufficient support for the tailored remedial scheme that Congress imposed.

C. Petitioners argue (Pet. 13) that Title VII is sufficient to prevent and remedy constitutional violations and thus that the Equal Pay Act is not "needed." The short answer is that Congress found otherwise, and it is for "*Congress* in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.'" *Flores*, 521 U.S. at 536 (emphasis added) (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)). Congress's judgments in that regard, moreover, "are entitled to much deference." *Flores*, 521 U.S. at 536; see also *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983) (legislation enacted pursuant to Congress's Section 5 authority is valid if the court can "discern some legislative purpose or factual predicate that supports the exercise of that power"); *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880).[11]

Haven Bd. of Educ. v. *Bell*, 456 U.S. 512, 523 n.13 (1982) (noting that "[m]uch of the testimony" at the hearings for Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits sex discrimination by educational programs receiving federal funds, "focused on discrimination against women in employment").

[11] See also *City of Rome*, 446 U.S. at 175; *Strauder* v. *West Virginia*, 100 U.S. 303, 311 (1880); *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949) (opinion of Jackson, J.) ("In no matter should we pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power."); cf. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

Congress found it appropriate, as it has with other civil rights legislation, to enact overlapping remedial schemes to ensure that the vestiges of previous employment discrimination are eradicated root and branch. See *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 524-526 & nn. 14, 16 (1982) (Title VII and Title IX both provide remedies for sex discrimination in employment); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 457-461 (1975) (Title VII and 42 U.S.C. 1981 both provide remedies for race discrimination in employment); cf. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 413-417 (1968) (42 U.S.C. 1982 and Fair Housing Act, 42 U.S.C. 3601 *et seq.*). Here, Congress found it important to supplement Title VII's general prohibition on discrimination in employment with a statutory scheme that is specially constructed to root out a particular manifestation of discrimination in the employment context.

In any event, petitioners utterly fail to explain how a perceived duplication in legitimate exercises of Congress's power implicates federalism interests. The proper inquiry is whether Congress has the power to legislate under Section 5; if it does, it may do so through one law or many laws with overlapping components without altering the federalism calculus. The Eleventh Amendment has never been considered a license for courts to superintend such quintessentially legislative judgments.

In short, given Congress's superior fact-finding ability and the attendant "wide latitude" (*Flores*, 521 U.S. at 520) to which Congress is entitled in exercising its "comprehensive remedial power" under Section 5 of

the Fourteenth Amendment,[12] the Equal Pay Act's scheme to detect and deter sex discrimination in wages is an appropriate exercise of Congress's Section 5 authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1999

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[12] *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) (quoting *Fullilove*, 448 U.S. at 483).

Supreme Court, U.S.
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No. 98-1845

IN THE

Supreme Court of the United States

STATE UNIVERSITY OF NEW YORK,
COLLEGE AT NEW PALTZ, *et al.*,

Petitioners,

v.

DR. JANICE W. ANDERSON, PH.D.
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DR. JANICE W. ANDERSON

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QUESTION PRESENTED

Whether Congress's abrogation of the States' Eleventh Amendment immunity in the Equal Pay Act of 1963, 29 U.S.C. § 206(d), falls within Congress's power under Section 5 of the Fourteenth Amendment.

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This brief is submitted on behalf of Dr. Janice W. Anderson ("Anderson") in opposition to the petition seeking a writ of certiorari.

STATEMENT OF THE CASE

Anderson is employed by the State University of New York College at New Paltz ("SUNY New Paltz" or "College") as an Associate Professor in the Communication and Media Department. Since her initial employment in 1984, SUNY New Paltz has paid Anderson significantly less than her male counterparts in the same department, who have the same academic rank, the same or similar qualifications, and who teach the same or similar subjects. Anderson teaches the same number of courses as each of her male colleagues, has equivalent academic research accomplishments, and performs the same amount of service to the College outside of teaching. (Pet. App. 31a-33a).

The only real difference between Anderson and her male colleagues is that she has always received a much lower salary for equal work.

In the early 1990s, Anderson filed an internal complaint at the College seeking to remedy the unequal salary. (Pet. App. 33a). That process and the subsequent litigation revealed that the College knew she was underpaid and even made written admissions that she was underpaid when compared to her male colleagues. Still, SUNY New Paltz did not correct the inequity. (Pet. App. 33a).

This suit followed, seeking to ensure that Anderson be paid the same salary as her male colleagues that perform substantially the same work.

This case challenges the pattern of sex-based wage discrimination at SUNY New Paltz pursuant to the Equal Pay Act, 29 U.S.C. § 206(d)(1) ("Equal Pay Act"), Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") and the New York State Executive Law §§ 290, *et seq.* ("NYS Human Rights Law"). (Pet. App. 28a).

At the close of discovery, the defendants moved for summary judgment on all issues. Anderson cross-moved for summary judgment on the Equal Pay Act claim. With a decision dated December 8, 1997, the District Court denied both parties' motions for summary judgment on the Equal Pay Act claim (Pet. App. 19a); however, the District Court granted the defendants' motion for summary judgment dismissing the claims under Title VII and the Human Rights Law. The District Court dismissed the Title VII claim because it found the plaintiff's statistical expert report did not adequately establish intent. (Pet. App. 16a).

The defendants filed an appeal from the failure of the Court to grant the motion for summary judgment on the one remaining claim under the Equal Pay Act alleging that the District Court erred in finding federal court jurisdiction under the Equal Pay Act against the State defendants. The plaintiff filed a cross-appeal from the Court's dismissal of her Title VII claim on the ground that inexplicably the District Court never addressed the defendants' admissions showing intent. Anderson's cross-appeal was dismissed by the Court of Appeals as premature. (Pet. App. 5a n.1).

Thus, the sole issue before the Court of Appeals was whether the Eleventh Amendment to the Constitution bars suit in federal court by the private party plaintiff under the federal Equal Pay Act.

The Court of Appeals affirmed the District Court's denial of SUNY New Paltz's motion to dismiss on Eleventh Amendment grounds. (Pet. App. 1a-10a). Applying the two-part test enunciated in *Seminole Indian Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996), the Court of Appeals ruled that the Equal Pay Act contains a clear statement of Congress's intent to abrogate the States' Eleventh Amendment immunity. (Pet. App. 6a). The Court also held that the Equal Pay Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity. (Pet. App. 7a-10a). The Court explained that the Equal Pay Act's burden-shifting scheme — in which plaintiffs must show that the employer pays different wages to employees of the opposite sex for equal work, and then defendants must show that the differential is based on any factor other than sex — "reaches only those wage disparities for which the employee's sex provides the sole explanation." (Pet. App. 9a). The Court concluded that the Equal Pay Act is "reasonably tailored to remedy intentional gender-based wage discrimination." (Pet. App. 9a). In so ruling, the Second Circuit Court of Appeals joined every other court of appeals that has addressed this issue. *See Ussery v. Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998), *cert. dismissed*, 119 S. Ct. 1161 (1999); *Varner v. Illinois State Univ.*, 150 F.3d 706, 709-717 (7th Cir. 1998), *petition for cert. pending*, No. 98-1117; *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838-839 (6th Cir. 1997); *Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

REASONS FOR DENYING THE WRIT

The Court of Appeals' ruling that the Equal Pay Act validly abrogated the States' Eleventh Amendment immunity is correct and consistent with the decisions of this Court and every other court of appeals that has addressed the question. Accordingly, further review is unwarranted.

A. Petitioners argue that under *Seminole Indian Tribe of Florida v. Florida*, *supra*, and *City of Boerne v. Flores*, 521 U.S. 507 (1997)), the federal courts lack subject matter jurisdiction over Anderson's Equal Pay Act case. That argument must fail.

In *Seminole*, the Supreme Court held, in relevant part, that before Congress may abrogate a State's Eleventh Amendment sovereign immunity, legislation must pass a two-part test:

> [f]irst, whether Congress has unequivocally expressed its intent to abrogate . . . immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

Seminole, *supra*, 517 U.S. at 55.

This Court has recently reaffirmed that the Fourteenth Amendment remains a valid source of Congressional power for abrogating sovereign immunity. *Alden v. Maine*, 67 U.S.L.W. 4601, 4615 (1999), citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) and *Seminole*, *supra*.

Applying *Seminole*, the test in this case is did Congress unequivocally express its intent to abrogate the States' sovereign immunity when extending the Equal Pay Act to the States in 1974, and whether Congress had the power to do it under the Fourteenth Amendment.

The first part of the *Seminole* test is straightforward. As petitioners concede, every court of appeals that has addressed the question specifically held that the 1974 Congressional amendments extending the coverage of the Equal Pay Act to the States constitutes a specific unequivocal statement of Congress's intent to abrogate sovereign immunity. *Reich v. New York*, 3 F.2d 581, 590-591 (2d Cir. 1933), *cert. denied*, 510 U.S. 1163 (1994)[1] *Mills v. State of Maine*, 118 F.3d 37, 42 (1st Cir. 1997); *Abril v. Virginia*, 145 F.3d 182, 186 (4th Cir. 1998); *Ussery v. Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1161 (1999); *Timmer v. Michigan Dept. of Corrections*, 104 F.3d 833, 837 (6th Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1391 (*en banc*, 9th Cir. 1993), *cert. denied*, 510 U.S. 946; *Brinkman v Department of Corrections*, 21 F.3d 370 372 (10th Cir. 1994); *Aaron v. Kansas*, 115 F.3d 813, 814-815 (10th Cir. 1997). Indeed, the petitioners concede in their brief that Congress met the first prong of the *Seminole* test in extending the Equal Pay Act to the State in 1974. (*See* Petitioners' Brief at p. 11.)

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1. In *Close v. New York*, 125 F.3d 31, 39 (2d Cir. 1997), the Second Circuit held that *Reich* is no longer good law in light of *Seminole* because of the *second* part of the two-part *Seminole* test. However, as the *Close* case reaffirms, the 1974 amendments to the Equal Pay Act make it manifestly clear that Congress stated unequivocally its intent to abrogate the state's sovereign immunity. *See Close v. New York*, *supra*, 125 F.3d at 39.

The second prong of the *Seminole* test requires more analysis.

The question on the second prong of the test is whether the Fourteenth Amendment may be inferred as the source of Congressional power absent Congress's explicit reliance. In amending the Equal Pay Act to permit suits by private citizens against a state employer, Congress did not recite that the Fourteenth Amendment was its source of power.

There is no real dispute that Congress need not recite explicitly its source of power in passing legislation. *EEOC v. Wyoming*, 460 U.S. 226, 243-244 n.18 (1983). The test is whether Congress *actually* has the power to act under the Fourteenth Amendment, not whether Congress explicitly stated it was acting pursuant to that power. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

Before *Seminole*, several Circuit Courts ruled explicitly that the Equal Pay Act could be seen as legislation to enforce the Fourteenth Amendment because it was passed to remedy sexual discrimination in pay. *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148 (3rd Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); *Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977); *Marshall v. Owensboro-Daviess County Hosp.*, 581 F.2d 116, 119-120 (6th Cir. 1978); *Marshall v. City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978).

Each of these cases arose after the Supreme Court ruled in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the Tenth Amendment prohibited the application of the Fair Labor Standards Act ("FLSA") to the States.

Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985), overruled *National League of Cities*. But in the ten-year interim period, between *National League of Cities* and *Garcia*, many States tried unsuccessfully to avoid coverage under the Equal Pay Act by arguing that, like the FLSA, suits under the Equal Pay Act were barred both by the absolute bar of the Tenth Amendment and the sovereign immunity bar of the Eleventh Amendment. In each of those cases, the States argued that since the Equal Pay Act was added as a companion statute to the FLSA, cases interpreting the applicability of the Tenth and Eleventh Amendments to the FLSA were equally applicable to the Equal Pay Act. All of these efforts failed as each Circuit that addressed the issue held that neither the Tenth *nor* the Eleventh Amendment barred suit in Federal Court under the Equal Pay Act.

After *Seminole*, some States, including New York, the petitioner here, have renewed the effort to avoid Equal Pay Act claims in federal court, revisiting the previously rejected argument that the Equal Pay Act does not remedy wrongs protected by the Equal Protection Clause. Each of the Circuit Courts that have addressed the question post *Seminole* have held, *without exception*, that consistent with what the Second Circuit held in this case, the Equal Pay Act that was passed to address unequal treatment based on gender, was appropriately passed either directly or *by inference* pursuant to the Fourteenth Amendment. *See Ussery v. Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998), *cert. dismissed*, 119 S. Ct. 1161 (1999); *Timmer v. Michigan*, 104 F.3d 833 (6th Cir. 1997) *Varner v. Illinois State Univ.*, 150 F.3d 706, 709-717 (7th Cir. 1998), *petition for cert. pending*, No. 98-1117.

Each of these cases apply the same analysis. As the Supreme Court has held, Congress acts within its authority under the Fourteenth Amendment if the Court can perceive a basis upon which Congress might predicate a judgment that the state action "constituted an invidious discrimination in violation of the Equal Protection clause." *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966).

Each Equal Pay Act case, including this one, starts with the bedrock position that Congress is given wide latitude to passing legislation to remedy violations of the Equal Protection Clause.

This Court has previously held that sex discrimination in employment is a form of discrimination protected by the Equal Protection Clause. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), a case upholding Title VII with its ban on sex-based employment discrimination.

The Equal Pay Act is a quintessential civil rights law, having as its aim the achievement of workplace equality for women. According to its legislative history, the Equal Pay Act was enacted to address the problem that relative wages in "many segments of American industry ha[ve] been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963). In enacting the Equal Pay Act, Congress sought "to remedy what was perceived to be a serious and endemic problem of employment discrimination" — the disparity in wages paid to men and women doing the same work. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

It is therefore fitting that in a unanimous ruling this Court recently stated that the Equal Pay Act is part of a larger statutory scheme aimed at protecting employees from discrimination, along with Title VII. *McKennon v. Nashville Banner Pub'l Co.*, 513 U.S. 352, 357 (1995). The *McKennon* Court characterized this network of laws, which includes the Equal Pay Act, as "part of an ongoing congressional effort to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in employment decisions." *Id.*

Here, the sole purpose of the narrowly drawn Equal Pay Act is to address historic inequality between the salaries of men and women who performed the same job. *See generally Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). It is hard to conceive of a more direct connection between a statute and the express purpose of the Equal Protection Clause, since the sole purpose of the statute is to remedy disparate salaries based on gender.

Thus, under the Supreme Court's test for evaluating whether a Congressional enactment fits within Congress's broad power to remedy invidious discrimination covered by the Equal Protection Clause, the Equal Pay Act easily passes muster.

Since the decision of the Court of Appeals is consistent with this Court's prior holdings and consistent with the holdings of all other courts of appeals, further review is not warranted.

B. The State defendants argue that *City of Boerne v. Flores*, *supra*, somehow mandates a different result. Petitioners argue that the Equal Pay Act allows recovery

without the proof of intent; thus, it fails the proportionality and congruity test under *Boerne*. This reliance is misplaced. In *Boerne*, this Court held that Congress could not rely on the Fourteenth Amendment to declare what constitutes a constitutional violation. *Boerne* simply held that Congress's power to enforce the Fourteenth Amendment to remedy wrongs protected by it does not authorize it to establish new substantive constitutional rights.

In overturning the act of Congress at issue in *Boerne*, the Court made clear that it was not modifying its earlier cases that enable Congress to pass statutes that remedy violations of the Equal Protection Clause itself or that serve the broader purposes of the Equal Protection Clause. The Court in *Boerne* specifically noted that:

> Legislation [enacted under section five of the Fourteenth Amendment] which defers or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is itself not unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.

City of Boerne v. Flores, *supra*, 521 U.S. at 518.

To support this proposition the Court cited to *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), a case holding that Congress had the power under the Fourteenth Amendment to pass Title VII despite the Eleventh Amendment argument of sovereign immunity. Since *Boerne* relied expressly on *Fitzpatrick*, a case upholding an act of Congress which prohibits sex discrimination, it cannot be

seriously argued that *Boerne* stands for the proposition that the application to the States of the Equal Pay Act, a statute limited *exclusively* to prohibiting sex discrimination in pay, is unconstitutional.

Even if this Court engages in the balancing and proportionality analysis urged by the petitioners here, it should quickly conclude that when compared with Title VII's broad reach, the Equal Pay Act is narrowly tailored to address the specific ill of sex discrimination in pay.

Title VII is a much broader and invasive statute than the Equal Pay Act. It covers all forms of employment discrimination including pay, benefits, leave provisions, hirings, firings, promotions, and other forms of benefits and working conditions. *See* 42 U.S.C. §§ 2000e-2(a)(2), 2(d), 3(a) and 3(b). Title VII also affords wide latitude in fashioning relief, including reinstatement orders, orders requiring promotions, creation of training programs, and a whole range of other affirmative relief. *See, e.g., Local 28 of the Sheet Metal Workers Assn. v. EEOC*, 478 U.S. 421 (1986). This is in addition to a full range of make whole remedies, including back pay, front pay, attorneys' fees, and compensatory damages. *See* 42 U.S.C. § 2000e.

By contrast, the Equal Pay Act is narrowly drawn to cover only discrimination in pay meaning that any award is limited solely to making up the difference in pay between the men and the women. It also requires only that an employer pay men and women equally for substantially equal work. *See, e.g., Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995). That is quite different from Title VII, which permits a recovery if an employee can show they were paid differently than employees in similar or comparable positions. *County of Washington v. Gunther*, 452 U.S. 161 (1981).

The most that can be said is that the Equal Pay Act remedies allowing for back pay and an order to pay an equal salary in the future, are somewhat redundant of Title VII remedies for the same conduct. Surely, the fact that remedies in one statute overlap remedies in a similar, constitutional statute, does not create a constitutional question. Despite their protests to the contrary, petitioners have utterly failed to show any case authority for their novel proposition that overlapping remedies creates a constitutional infirmity.

It is simply wrong for the petitioners to argue that the Equal Pay Act creates greater exposure of the State than Title VII. One need only look at the statute to see the absurdity of that position.

If Congress had the power to pass Title VII under the Fourteenth Amendment, it surely had the power to pass the Equal Pay Act with its narrow focus, more limited impact and sharp connection to rights protected by the Equal Protection Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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